113-258

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1011.

DENNIS LOONEY, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 6, 1884.

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JUDD & DETWEILER, Printers.

1 I. *Petition. Filed July* 8, 1880.

In the Court of Claims. December Term, 1870.

DENNIS LOONEY
vs
THE DISTRICT OF COLUMBIA. } No. 8.

To the Honorable Judges of the United States Court of Claims:

Your petitioner respectfully represents:

That on the — day of ——, A. D. 18—, a written contract was made and entered into by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, S. P. Brown, and Adolf Cluss, comprising the Board of Public Works of the District of Columbia, in the words and figures as set forth in Exhibits A and B.

That by said contract the said Board of Public Works, on behalf of the District of Columbia, bound themselves to pay unto your petitioner, for grading and gravelling, the sum of 30 cents per cubic yard.

That by the terms of said contract the Board of Public Works, on behalf of the District of Columbia, expressly stipulated and agreed to pay, in lawful money of the United States, to your petitioner the contract price for all work done under said contract.

2 That the said Board of Public Works, on behalf of the District of Columbia, did fail and refuse to pay your petitioner in the lawful money of the United States, as they had expressly agreed to do, but compelled your petitioner to receive certificates of indebtedness of the Board of Public Works of the value in the lawful money of the United States of 40 to 60 cents on the dollar.

That by the failure of the said Board of Public Works to comply with their part of the contract, in regard to paying your petitioner in the lawful money of the United States, and compelling petitioner to receive certificates of the indebtedness of the actual value of about one-half of the value of the lawful money of tne United States, whereby petitioner could carry out his part of the contract, so far as it provided that the workmen under petitioner should be paid in cash current, petitioner did have to sell said certificates, and he sold them and realized the highest market value of the said certificates of indebtedness issued and delivered to him by said Board of Public Works at the various dates; and by the failure of the Board of Public Works to comply with their part of the contract, petitioner was damaged to the amount of ten thousand dollars in lawful money of the United States.

Petitioner alleges that he fully complied with the terms of said contract; that the work done and accepted under the same at the contract price amounts to $10,000; that he has received in certificates of indebtedness of the value in lawful money of the United States of $16,800, leaving due him $10,000.

Petitioner demands judgment against the District of Columbia in the sum of ten thousand dollars.

DENNIS LOONEY.
V. B. EDWARDS,
Attorney.

M. BLAIR,
CHARLES E. CREECY,
Of Counsel.

P. O. address, 611 F street N. W.

3 DISTRICT OF COLUMBIA, } ss :
County of Washington, }

Dennis Looney personally appeared before me, and made oath according to law, that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by your petitioner, and that he is justly entitled to the amount therein claimed from the District of Columbia, after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true.

DENNIS LOONEY.

Subscribed and sworn to before me, this 7th day of July, A. D. 1880.

[SEAL.] GEO. F. GRAHAM,
Notary Public.

II. *Traverse. Filed November* 12, 1880.

And now comes the Attorney General, on behalf of the District of Columbia, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Assistant Attorney General.

4 III. *Motion for Leave to Amend Petition, filed November* 4, 1881, *and Allowance of Same.*

To the Honorable the Judges of said Court:

Your petitioner requests to amend his petition as follows:

1st. To insert date and number of contract.

2. An averment that petitioner was required to pay his workmen in cash.

3. An averment that the Board of Public Works insisted and required the work to go on.

4. An averment that the Board of Public Works urged and requested petitioner to sell or pledge said certificates, and that the said District would be responsible for the loss that might be incurred.

5. An averment that in equity and good conscience the loss oc-

casioned should be reimbursed him by the District, and a decree rendered against said District for said loss.

Respectfully submitted.

V. B. EDWARDS,
Attorney for Plaintiff.

Nov. 4, 1881.

Allowed Oct. 10, 1881.

WM. A. RICHARDSON,
Judge, &c.

5 IV. *Amended Petition. Filed Nov.* 28, 1881.

To the Honorable Judges of the United States Court of Claims:

Your petitioner respectfully represents:

That he is a citizen of the United States, and resides in the city of Washington, District of Columbia.

That on the 11th day of September, 1872, the Board of Public Works, by a written contract, number 510, of which Exhibit A is a true copy, contracted with your petitioner for a performance of the work at the prices therein specified.

That your petitioner performed the work contracted for, and was accepted by the said Board, and certificates of the auditor of said Board were issued to him from time to time as the work progressed, stating that items, amounting in the whole to the sum of about $26,864.75, were due to your petitioner on account thereof, and Exhibits B, C, D, E, F, G, H, & I are true copies.

That, by the terms of said contract, the Board of Public Works expressly stipulated for and on behalf of said District that said sums, when certified, should be paid in lawful money of the
6 United States, and your petitioner was required to pay the workmen employed by him in the performance of said work in cash.

That said District failed to pay as stipulated.

That while so failing to pay your petitioner, said Board nevertheless insisted and required that the work should go on, and that the workmen employed by him should be paid in cash, and, to enable him to do so, urged and requested your petitioner to sell or pledge said certificates and obtain the necessary means, assuring him that said District would be responsible and allow for the loss that might be incurred thereby.

That accordingly petitioner did sell said certificates from time to time at the highest market price, ranging from 50 to 70 cents on the dollar, to enable him to carry on the work.

And your petitioner alleges that he sustained a loss thereby to the amount of about $10,000.00, which, in equity and good conscience, said District should reimburse him, and he therefore prays a decree by this court against said District for said sum, with interest thereon from the date of said several certificates.

Your petitioner represents that no assignment or transfer of said claims, or any part thereof or interest therein has been made except as hereinbefore stated, and that he is justly entitled to the amount

therein claimed from the District of Columbia after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true, and that he has at all times borne true allegiance to the Government of the United States; that he has not in any way voluntarily aided or abetted, or given encouragement to the rebellion against said Government.

DENNIS LOONEY.

V. B. EDWARDS, *Attorney.*
M. BLAIR, *Counsel.*

DISTRICT OF COLUMBIA, }
County of Washington, } ss:

7 Dennis Looney personally appeared before me and made oath according to law that no assignment or transfer of said claim, or any part thereof or any interest therein, has been made by your petitioner, and that he is justly entitled to the amount therein claimed from the District of Columbia, after allowing all just credits and offsets, and that he believes the facts as stated in said petition to be true.

DENNIS LOONEY.

Subscribed and sworn to before me, this 2nd day of November, A. D. 1881.

[SEAL.] GEO. F. GRAHAM,
Notary Public.

EXHIBITS A, B, C, D, E, F, G, H, and I TO AMENDED PETITION.

W. A. C. (510.) See F. No. 781.

[7 stamps.]

This contract, made and concluded this eleventh day of September, in the year one thousand eight hundred and seventy-two, by and between Henry D. Cooke, Alexander R. Shepherd, James A. Magruder, A. B. Mullett, and S. P. Brown, constituting and composing the Board of Public Works of the District of Columbia, of the first part, and Dennis Looney, of Washington, D. C., of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner, to grade and gravel Fourteenth street east, between B street south and Boundary, in the city of Washington, D. C., the said grading and graveling to be completed in accordance with the specifications following, to wit:

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA.

Specifications for Grading Streets, etc.

* * * * * * *

The material obtained in grading will be deposited where directed by the chief engineer of the Board of Public Works, and no
8 sand, gravel, cobble-stones, curb, bricks, or pipe obtained in the excavation or found on the premises shall be considered the property of the party of the second part, nor used by him or them, except as hereinafter prescribed.

* * * * * * *

Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract in cash current, and not in what is denominated store pay or orders, and that he will from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And, if such evidence is not furnished, such sum or sums as may be necessary for such payment of claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify in writing that the party of the second part completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty (30) days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made, as hereinafter mentioned.

And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agree that he shall not be entitled to demand or
9 receive payment for any portion of the aforesaid work, except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract: Provided, That partial payments may be made, under direction of the said party of the first part, otherwise than upon the estimates of the said engineer, as provided above, if in the opinion of the said party of the first part the vigorous prosecution of the work will be promoted thereby.

* * * * * * *

Tenth. It is further agreed that the said party of the second part shall received the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit: Grading, thirty (30) cents per cubic yard, which shall include the first two hundred (200) feet of hauling, and one (1) cent per cubic yard for every additional two hundred (200) feet of hauling. Graveling, per square yard, fifteen (15) cents.

* * * * * * *

Eleventh. It is further agreed that the measurements shall be made by the engineer of the said party of the first part, or his assistants.

Twelfth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay or cause to be paid to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found, from time to time, due him according to the contract.

* * * * * * *

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

H. D. COOKE, [SEAL.]
ALEX. R. SHEPHERD, [SEAL.]
JAMES A. MAGRUDER, [SEAL.]
Board of Public Works of the District of Columbia.

DENNIS LOONEY,
Contractor.

Signed and sealed in presence of—
WM. E. NOTT.
T. H. JOHNSON.

No. 2181. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *July* 11, 1873.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to three thousand dollars.

$3,000. J. C. LAY, *Auditor.*

Across face: "Board of Audit, July 31, 1874, received."

Across back: "Dennis Looney."

No. 2180. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *July* 11, 1873.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to two thousand dollars.

$2,000. J. C. LAY, *Auditor.*

Across face: "Cancelled by Board of Public Works." Paid.
Across face: "Dennis Looney."

11 No. 1000. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *February* 24, 1873.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to four thousand six hundred and sixty-five dollars and fifty cents.

$4,665.50. J. C. LAY, *Auditor.*

Across face: "Cancelled by Board of Public Works."
Across back: Dennis Looney; paid in cash $665.50."

No. 2182. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *July* 11, 1873.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to three thousand one hundred and seventy-eight dollars and fifty cents.

$3,178.50. J. C. LAY, *Auditor.*

Across face: "Cancelled by Board of Public Works." Paid.
Across back: "Dennis Looney."

No. 139. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *January* 8, 1874.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to five thousand dollars.

$5,000. J. C. LAY, *Auditor.*

Across face: "Board of Audit, July 31, 1874, received."
Across back: "Dennis Looney, his X mark." Witness, S. M. Corriden.

No. 140. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *January* 8, 1874.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B
12 street southeast to Boundary N. E., amounting to five thousand dollars.

$5,000. J. C. LAY, *Auditor.*

Across face: "Board of Audit, July 31, 1874, received."
Across back: "Dennis Looney, his X mark. Witness, S. M. Corriden."

No. 141. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *January* 6, 1874.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street

southeast to Boundary N. E., amounting to five hundred and twenty dollars and seventy-five cents.

$520.75. J. C. LAY, *Auditor.*

Across face: "Cancelled August 19, by Board of Audit."

Across back: "Pay the amount of the within certificate to the bearer for value received. Dennis Looney, his X mark. Witness, S. M. Corriden."

No. 4806. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *December* 27, 1873.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to three thousand dollars.

$3,000. J. C. LAY, *Auditor.*

Across face: "Board of Audit, July 31, 1874, received."

Across back: "Dennis Looney. Witness, W. E. Chandler."

No. 2179. OFFICE OF AUDITOR, BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *July* 11, 1873.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to one thousand dollars.

$1,000. J. C. LAY, *Auditor.*

Across face: Board of Audit, Jan'y 13, 1874, received. Special assessment division, June 23, 1882, District of Columbia. Special assessment division. Paid. District of Columbia. Property of the sinking fund. Not negotiable.

Across back: "Dennis Looney."

13 V. *Plea of Set-off. Filed February* 2, 1882.

Now comes the Attorney General on behalf of the District of Columbia, and for a further plea, says: That at and before the filing of the petition herein by the claimant the claimant was and still is indebted to the District of Columbia in the sum of five hundred dollars for money had and received by the claimant for the defendant, and for money paid by the defendant to the claimant by mistake of fact, and the said claimant be so indebted as aforesaid, in consideration thereof, promised to pay the defendant the said sum of five hundred dollars on request, yet the said claimant, although often requested so to do, hath not, nor hath any one in his behalf as yet, paid the said sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses so to do, which said sum of five hundred dollars, with interest thereon from January
14 8, 1874, at the rate of six per cent. per annum, the defendant prays leave to set off and counter claim against the demand of the claimant.

THOMAS SIMONS,
Ass't Att'y General.

VI. *Replication to Plea of Set-off. Filed March* 2, 1883.

Comes the claimant and says he is not indebted to the defendant as alleged in defendant's counter-claim filed in this cause, whereupon the claimant prays that the counter-claim be dismissed.

DENNIS LOONEY.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District aforesaid, Dennis Looney, to me personally known, who made oath in due form and according to law that the statements made in the above replication are true to the best of his knowledge and belief.

Witness my hand and seal this 17th day of May, 1882.

[L. S.] W. T. S. CURTIS,
Notary Public.

15 VII. *Findings of Fact and Conclusions of Law. Filed February* 25, 1884.

This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

On the 11th of September, 1872, a contract in writing, No. 510, was entered into between the Board of Public Works of the District of Columbia, party of the first part, and the claimant, party of the second part, whereby the claimant agreed to furnish material and labor, and in a good and substantial manner to grade and gravel Fourteenth street east, between B street south and Boundary, in the city of Washington, D. C., at the prices therein specified. The material parts of said contract involved in the present controversy are as follows:

Seventh. It is further agreed that the said party of the second part shall punctually pay the workmen who shall be employed by him on work under this contract in cash current, and not in what is denominated store pay or orders; and that he will from time to time, and as often as may be required by said party of the first part, furnish to said party satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And, if such evidence is not furnished, such sum or sums as may be necessary for such payment of claims shall be retained by said party of the first part until the said claims shall be fully satisfied.

Thirteenth. And the said party constituting and composing the Board of Public Works in and for the District of Columbia aforesaid agree with the said party of the second part to perform all the stipulations of this contract obligatory in it, and to pay, or cause to be paid, to the said party of the second part, or to his heirs, executors, or administrators, in lawful money of the United States, the amount which may be found from time to time due him according to the contract.

II.

Under said contract the claimant did a large amount of work. Three partial measurements or estimates were made at different times, and for the amount of money found due him thereby he received six certificates of the auditor of the Board of Public Works for different sums (Nos. 1000, 2179–2182, 4806), amounting in all to $16,844, in the following form:

No. 2181.] OFFICE OF AUDITOR BOARD OF PUBLIC WORKS,
WASHINGTON, D. C., *July* 11, 1873.

I hereby certify that I have this day audited and allowed the account of Dennis Looney for work on 14th street east, from B street south to Boundary, amounting to three thousand dollars.
$3,000. J. C. LAY, *Auditor.*

16 After the work was completed he made the following application to the Board:

WASHINGTON, *Dec.* 5, 1873.

Hon. H. A. WILLARD, *Vice-President Board of Public Works:*

Having completed my contract on 14th St. east, from B St. S. E. to Boundary, I would respectfully ask for a final measurement of the same.

Resp'fully, &c. DENNIS LOONEY.

In pursuance thereof a final measurement was made, and the following account was stated thereon by the auditor of the Board of Public Works:

WASHINGTON, D. C., *Dec. 18th,* 1873.

Board of Public Works, D. C., to Dennis Looney, Dr.

50,437 cubic yards grading, at 30 cents per yard		$15,131 10
$46\frac{222}{1000}$ cubic yards dry wall, @1.00 per yard		46 22
50,437 cubic yards haul, 1,300 ft. over 200 ft., at $16\frac{1}{4}$ per yard		8,196 01
22,910 square yards of graveling, at 15c.		3,436 50
Box trunk for draining 14th and Md. Ave.		54 92
		*27,364 75
Deduct certif's 1000, 2179 to 2182 inc.	$13,844	
4806	3,000	
		16,844
		$10,520 75

For this apparent balance (which by error of addition unknown to either party at the time was $500 too much) he received three certificates of the auditor of the Board of Public Works, in the form above set out, amounting to the sum of $10,520.75, and receipted

* Correctly added, these figures should be $26,864.75.

for the same January 8, 1874. These auditor's certificates were issued in accordance with the usual course of business as conducted by the Board of Public Works with its contractors.

III.

The certificates so received by the claimant, amounting in all to $27,364.75 were disposed of by him as follows:

He collected of the Board in cash $744.

One certificate of $1,000 was indorsed and sold by him at its market value, sixty-five cents on a dollar, and was redeemed by the Board from his assignee at its face value in payment of special taxes due to the District.

Three certificates (less cash received) of the face value of $9,100, he exchanged at par for "sewer certificates," so-called, bearing interest at 8 per cent. per annum, and other interest-bearing securities of the District of Columbia, all payable on time. (See Fendall's Case, 16 C. Cl's R., 106.) The interest-bearing securities he sold at their market value, sixty-five cents on a dollar.

Five certificates, of the face value of $16,520.75, he indorsed and sold at about their market value, seventy cents on a dollar, and they were funded by his assignee into District of Columbia three-sixty-five bonds issued under the act of June 20, 1874, chap. 377 (18 Stat. L., 116).

17 IV.

Before selling his interest-bearing securities, for which he had exchanged his auditor's certificates, the claimant asked the treasurer what they were worth, and where he could sell them at par, and the treasurer replied, "I do not know where you can get par for them; do as others are doing, and sell them the best way that you can."

Conclusions of Law.

Upon the foregoing findings of fact the court decides as conclusions of law that—

1. The claimant has no cause of action, and is not entitled to recover on the demands sued upon.

2. The defendant is entitled to recover $500 from the claimant, as set up in the counter-claim, for overpayment made through an error in adding the account, upon a final settlement of which he was overpaid that sum, as set out in finding II.

VIII. *Opinion of the Court.*

RICHARDSON, J., delivered the opinion of the Court.

The claimant had a written contract with the Board of Public Works of the District of Columbia for grading and graveling Fourteenth street, in the city of Washington, which he performed on his part according to its terms. As the work progressed, and at its completion, measurements were made, accounts were stated by the auditor of the Board, and certificates in different accounts were given

to him by the auditor, in accordance with the usual course of business in such cases, certifying that he had audited and allowed the account of the claimant for work on Fourteenth street, amounting to the sum therein stated.

The claimant collected $744 in cash. He exchanged auditor's certificates amounting to $9,100 for interest-bearing securities payable on time, and then sold the same at sixty-five cents on a dollar. He sold one certificate of $1,000 for sixty-five cents on a dollar, and the same was redeemed by the District at par in payment of special taxes. He also sold $16,520.75 of certificates at seventy cents on a dollar. All the sales were at the market value of the securities thus disposed of.

He now claims the difference between the face value of the securities and the amount which he received for them by sale, which is found to be $8,491.23.

We have had several other claims of this class already considered, and a very large number of the same kind are still pending. We have uniformily held that the claimants, in such cases, had no cause of action, and could not recover. In Morgan's case, recently decided, we expressed our views on that subject as follows:

"It is a well known fact of public local history, repeatedly referred to in the opinions of this Court, to a greater or less extent, reviewed in public documents, and discussed in Congress and elsewhere, that the government of the District of Columbia and
18 the Board of Public Works created by the act of February 21, 1871, ch. 62, (16 Stat. L., 419), in their efforts to improve and beautify the city of Washington on a comprehensive scale in order to make it a fit and imposing capital of a great nation, involved the District in debt to the extent of some $20,000,000, and were without money either to proceed further with the contemplated work or to meet obligations already incurred. The credit of the District was greatly impaired, and its securities fell in the market below fifty cents on a dollar.

"The Board of Public Works, for the convenience of its numerous creditors, went on auditing their claims and giving to them certificates signed by the auditor, stating that he had audited and allowed their accounts for work to the amount specified therein. These certificates were not in terms negotiable, but they were frequently sold in the market, and often hypothecated for money borrowed. (Neuchatel Co. Case, 16 C. Cls., 593.) They were also received by the Board in exchange for what were commonly called sewer certificates, a kind of security issued by the Board, payable on time, with interest coupons attached, representing interest at the rate of 8 per cent. per annum. These sewer certificates were redeemable by the sinking fund commissioners, out of the proceeds of collections from assessments upon owners of real estate for sewer improvement work.

"In 1874 Congress passed the act of June 20, chapter 337 (18 Stat. L., 116), repealing "all provisions of law providing for an executive, for a secretary for the District, for a legislative assembly, for a Board of Public Works, and for a delegate in Congress in the District of

Columbia," and creating a commission for the future government of the District until otherwise provided by law, prohibiting the further issue of sewer certificates, and forbidding the enforcement of the assessments upon real estate which were held by the sinking fund commissioners for the redemption of such certificates. This completely destroyed all means for paying those certificates by any public officer, as well as for the enforcement of payment by the holder, according to the terms of the contract.

"But Congress at the same time created a Board of Audit, which, within a limited time, was authorized to examine and audit for settlement the unfunded and floating debt of the District, and of the Board of Public Works, including these auditor's certificates and sewer certificates, and providing that another kind of certificates should be issued by the Board of Audit to creditors whose accounts they allowed, and that these latter certificates might be exchanged for District bonds, commonly called three-sixty-five bonds. Most of the unpaid certificates of all kinds were thus redeemed, and the redemption of what remained when the Board of Audit was abolished was subsequently provided for by the District claims act of June 16, 1880, ch. 243, giving jurisdiction of such claims to this Court. (Supplement to Rev. Stat., 562; Fendall's Case, 16 C. Cls. R., 106.)

"The District has thus paid or funded into long bonds now selling in the market at more than 13 per cent. above par, all its matured indebtedness of every kind. The present claimant was one of those creditors, who, after having obtained the certificates of the auditor of the Board of Public Works for the amounts found due him, sold them at a discount or exchanged them, by himself or his assignee, for sewer certificates, and then sold the latter at or below sixty cents on a dollar of their face value.

"He now brings this action to recover damages for breach of contract on the part of the defendant for not having paid
19 him in lawful money of the United States, according to the terms of the agreement under which he did his work, claiming as the measure of damages the difference between the face value and the market value of the certificates which he accepted. This raises precisely the same question which was presented in the case of Brown and others *v.* The District (17 C. Cls. R., 402) and Neuchatel Co.'s Case (17 C. Cls. R., 386) and Adams' Case (17 C. C. R., 351), where we held that the claimants could not recover.

"The claim set up in these cases is certainly a novel one. It is nothing more or less than a claim that a debtor financially embarrassed, so that his credit is greatly impaired and his obligations are much below par in the market, afterwards, when his circumstances are improved, and he has paid the principal of all his debts in full, he shall be liable further to pay the losses of his creditors who sold his obligations at a discount when he was embarrassed; or, in other words, that he shall be liable in damages for not maintaining his credit.

"The fact that the contract of the claimant required the district to pay him in lawful money of the United States does not alter the

case nor in the slightest degree change the defendant's obligations. All debts are payable in lawful money, unless otherwise expressly agreed between the parties, and the insertion of that obligation in the contract created no additional liability. It was merely a written agreement to do what the district would have been held to do without it.

"The claimant's losses arose partly from his own misfortunes, or his own distrust of the credit of the District, as well as from the temporary inability of the defendant to meet its obligations at maturity.

"The first certificates which he received, the auditor's certificates, were mere acknowledgments of the amount found due him, and were, of course, payable in lawful money, both by contract and by law. He might have maintained an action upon them and recovered the full amount, with interest. The measure of damages for the non-payment of money according to contract is the amount due with interest, the latter being the damages for delay. (Insurance Co. *v.* Piaggie, 16 Wall., 378).

"The claimant voluntarily sold at a discount his claims for payment for work done according to the auditor's certificates or changed them by himself or his assignee for obligations payable on time, with interest. This exchange was payment by the acceptance of a new and different obligation, the value of which, as between the parties, was settled by the substitution of one security for another. That the new security was sold subsequently below par did not affect the terms of the previous settlement. The defendant is no more liable to the claimant for any loss which the latter suffered by the sale of the securities thus taken than the claimant would be liable to the defendant for any profits which he might have derived from selling at a profit; and he would have obtained a profit had he exchanged his securities for three-sixty-five bonds, as he had a right to do, and have retained them until the credit of the District revived.

"One who elects to sell the obligations of his debtor, instead of retaining them for collection, must himself sustain the losses, as he would himself receive the profits of the transaction."

In this case the claimant makes another point: That he was directed by the treasurer of the Board of Public Works to sell his interest-bearing securities. Such was not the fact, as we understand the language of the treasurer, as shown by the findings, and if it were so it would be wholly immaterial. The treasurer had no authority to speak for the Board of Public Works nor for the District of Columbia, and what he said on the subject was not binding on either. But he gave no directions in the matter. The claimant sought information, merely asking him where he could sell his securities at par. The treasurer replied "I do not know where you can get par for them; do as others are doing, and sell them the best way that you can." That the claimant followed the suggestion thus made to him and sold his claims against the District at a large discount was his own fault. The District finally paid its debts in full or funded them into bonds now selling above par. The assignees of the claimant received the benefit of their better judgment in buying the securities at a discount and holding

them until they rose in market far above their face value. The profit and loss must stand where the parties, by their own actions, caused the same to fall.

There is another branch to the present case. The defendant has filed a counter-claim to recover the sum of $500 paid to the claimant in mistake of fact. This they are authorized to do by section 3 of the District claims act of June 16, 1880, chapter 243 (1 Supplement to Rev. Stat., 562). That section makes it the duty of the Attorney General to defend the District of Columbia against all claims prosecuted under the act in like manner as he is required to defend the United States in this Court, "with the same power to interpose counter-claims and offsets."

The provisions in relation to counter-claims and offsets are contained in the Revised Statutes, section 1059, clause second, and section 1061.

The power of the Court of Claims to give judgment against a claimant upon a counter-claim under those provisions was authoritatively settled by the Supreme Court in the case of McElrath *v.* The United States (102 U. S. Rep., 426), affirming the judgment of this Court therein (12 C. Cls. R., 312).

The application of the statutes on the subject of counter-claims to cases against the District of Columbia we considered and explained in Neitzey's Case (17 C. Cls. R., 111).

The finding of facts show (Finding II) that the claimant was overpaid $500 on a final settlement through a clerical error in addition, unknown to either party at the time. This was clearly a payment in mistake of fact. The claimant has, therefore, that amount of the defendant's money, which he cannot in equity and good conscience retain, and which may be recovered back on the plea of set-off in this case.

It follows from the whole case that the claimant cannot recover upon the demands set up by him, and that the defendant is entitled to judgment against him for $500 upon its counter-claim, and it will be so entered of record.

21 IX. *Final Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 25th day of February, A. D. 1884, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, both for and against the District of Columbia and the claimant, upon the petition of the claimant and the counter-claim of the defendant, finds upon the whole case that the claimant is indebted to the defendant in the sum of five hundred dollars, and do order, adjudge, and decree that the said The District of Columbia do have and recover of and from the said Dennis Looney the sum of five hundred dollars ($500).

22 X. *Application of Claimant for Allowance of Appeal and Order Allowing Same.*

DENNIS LOONEY
vs.
THE DISTRICT OF COLUMBIA. } No. 8.

From the judgment rendered in the above-entitled cause on February 25, 1884, in favor of defendant, the claimant, by his attorney, on the 15th day of April, A. D. 1884, makes application for and gives notice of an appeal to the Supreme Court of the United States.

V. B. EDWARDS,
Attorney for Claimant.

Filed April 15, 1884.

And now, to wit, April 17, 1884, it is ordered by the Court that the appeal be allowed as prayed for.

23 In the Court of Claims.

DENNIS LOONEY
vs.
THE DISTRICT OF COLUMBIA. } No. 8.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusions of law thereon by the Court, of the opinion of the Court, of the final judgment of the Court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this sixth day of October, A. D. 1884.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 1011. Dennis Looney, appellant, *vs.* The District of Columbia. Filed 6th October, 1884.

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Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1884.

DENNIS LOONY
vs.
THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT OF APPELLANT.

STATEMENT OF THE CASE ALSO SET FORTH IN THE RECORD PAGE.

This was a suit in equity, under the act of Congress approved June 16, 1880, brought in the Court of Claims, to recover from the defendant the damages or loss on account of the defendant not paying the appellant in the medium as provided by the terms of the written contract, which the parties entered into.

The appellant established his claim—

1. By the written contract as set forth in the record.
2. By the evidence and engineer's reports, showing the amount of work done, the acceptance, and the kind of medium he was paid in.
3. The amount of loss by proof, and by the finding of facts by the court below.

ASSIGNMENT OF ERRORS.

The appellant here contends that the Court of Claims—

1. Erred, upon the facts stated in rendering judgment in favor of the defendant.

2. Upon the facts stated in not rendering judgment in favor of the claimant.

3. In its conclusions of law, upon the facts stated.

ARGUMENT ON THE LAW.

The Court of Claims found as a fact that claimant was to be paid by the terms of his written contract in the lawful money of the United States for the work done by him, and also that he had been given certificates in lieu thereof; that he had sustained a loss thereby and that he could not recover that loss.

The court also found the form of the certificate that the claimant received (see Finding II), and this honorable court has already decided that a similar form of certificate was non-negotiable.

Coudry *vs.* Vandenberg, 101 U. S., 572.

The court also found that the market value of such certificates were about sixty-five cents on the dollar; that claimant asked the Treasurer where he could get par for them, and the Treasurer told him to do as others were doing—sell them the best way you can.

Now, it is contended that the court erred in its conclusion of the law, because the certificates being non-negotiable he could not transfer his rights under the contract unless he specifically assigned them, and it was not pretended that he had made any assignment of the contract, as the court has found that the claimant was to be paid in lawful money for all work done under his contract. His measure of damages was the difference between the market value of the certificates and lawful money at the date said certificates were received by him, and interest thereon until paid.

City of Memphis *vs.* Brown, 20 Wall., 289.

This honorable court has held over and over again that the payment in any other medium than that expressed in the

contract was no payment. In the case before cited, which would seem to be almost a case identical in point with this, this honorable court says, page 304:

"If Brown has received bonds of the city, which they are "bound to return and do not return, what damage does the "city suffer? The face of the bonds and interest, it is said, "as they run to maturity, the city will then be liable for "the whole amount. Not so; we are not to inquire what "may be the damage to the city eighteen years hence, but "what it suffers at the present time by the default of Brown "& Co."

The court further says, page 305:

"In Dana *vs.* Fielder, 2 Kernan, 48, the court says: 'Com- "plete indemnity requires that the vendee shall receive that "sum which, with the price he had agreed to pay, would "enable him to buy the article which the vendor had failed "to deliver.'"

In Griffith *vs.* Burden, 35 Iowa, 138, the court says:

"Another rule equally well grounded, and more frequently "applied, is that the damages ought to be such as will com- "pensate the parties for his loss."

In the case before cited, page 306, the court says:

"The city was not able or was not willing to meet its "guaranty of payment, and was indebted to the contractors "in the amount of several hundred thousand dollars. The "contractors must have relief or go to the wall, as their prede- "cessors had done. They applied to the city for that relief, "and instead of making payment, the city undertook to "make a loan of its bonds. It imposed harsh and severe "conditions, which nothing except the financial desperation "of the contractors could justify them in accepting. Their "claim against the city for the amount of work done was "valid, and the amount was then payable. * * * (Page "307:) It is sufficient to say that it is a hard and oppressive "contract, and if the pound of flesh is exacted the party

"must take care that he violates no law of the State in ob-
"taining it. Before the court will sanction the exaction of
"conditions so harsh and oppressive it will be careful to know
"that every stipulation on the part of the creditor has been
"fully performed."

In the Memphis case, as in this, there was delay in making payment; delay as the court well says was a serious injury to the contractor, their necessities brooked no delays; delay was nearly as bad as a refusal, after taking advantage of their necessities to make a hard and oppressive bargain, by requiring the contractor to pay his workmen in cash, and then refusing to pay in cash for the work done, thereby placing the contractor at the mercy of any one having money to loan, and deliberately refusing to perform their part of the contract, it is difficult to understand how parties before a court of equity can fail to recover; the exchange of one certificate for another was a shift to avoid a direct refusal to pay. This honorable court well says, in the case before cited, City of Memphis *vs.* Brown, 20 Wallace, 311:

"The work was done under a contract with and by the
"employment of the city; the claim of the contractor is upon
"his contract, to which the city alone is the counter party.
"A particular mode in which payment was expected to be
"obtained fails."

The claimant in this case brought suit upon his contract for work done and the city failed to pay cash when the sum was due, but gave only evidence of indebtedness to the contractor, and these long afterward were, by an act of Congress, exchangeable into other certificates. If the defendant could not pay when the sum was due, what assurance had the claimant that the defendant would ever pay? None whatever.

The defendant is bound to make good any loss to claimant that he sustained by reason of the sale of said certificates, as claimant is only to be charged with the amount he realized, as the certificates were non-negotiable, having no commercial value.

The Court of Claims found that by the 7th clause of the contract the claimant had to pay his workmen in cash, and by the 8th clause partial payments were to be made, and by the 12th clause such payments were to be made in lawful money, and that the defendant did not pay in lawful money, but that certificates were given, and that the claimant was advised by the Treasurer to sell them the best he could, and that claimant sold them and relized about seventy cents on the dollar; this certainly was exacting the pound of flesh from the claimant by the defendant.

Because the certificates given to the claimant he was by virtue of his contract entitled to receive, as evidence of the city's indebtedness to him, so that he could present them to the Treasurer for payment in cash; the city required the claimant to pay his workmen in cash, but would not pay him cash, so that he could pay his workmen, but compelled him, by their refusal to pay, to sell his certificates for the market value, about seventy cents, so that he could and did comply with his part of his contract. This was oppression.

The receipt of any thing else than money is not payment unless the proof is clear that the same was received in payment, and the burden of this proof is upon the party maintaining payment.

Considering this case upon its merits: The contractor did a large amount of work, it was measured by the engineer of defendants, certificates of indebtedness given for the work done under the contract. The contractor demanded payment of these certificates, but the Treasuser refused to pay, thus violating their contract. The contractor had to have money to pay his workmen, or stop his work, or violate his agreement to pay his workmen in cash; he went to the Treasurer and was advised to sell his certificates, and by so doing sustained a great loss.

The case before cited is no stronger than this, and yet the city was held to be liable for the loss. The defendant having failed and refused to comply with the material part of its contract, is liable to claimant for the loss he sustained by the sale of the certificates.

It is further contended that the refusal of the defendant to pay, as it had by its written contract agreed to pay, and compelling claimant to receive and sell a medium other than provided by his contract, so he could comply with the seventh clause of the contract on his part, was duress; that by the act of Congress approved June 16, 1880, passed by Congress, giving the Court of Claims equity jurisdiction, it was bound by the act to give the claimant relief by allowing him the loss he sustained by the sale of the certificates, as he was only bound to account for the highest market value of the same at the date he received them, unless he sold them for more, and then for the amount he realized therefrom.

Respectfully submitted,

EPPA HUNTON,
V. B. EDWARDS,
For Claimant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1884.

DENNIS LOONEY
vs.
THE DISTRICT OF COLUMBIA. } No. 1011.

BRIEF FOR THE APPELLEE.

In the Supreme Court of the United States.

OCOBER TERM, 1884.

DENNIS LOONEY
vs.
THE DISTRICT OF COLUMBIA. } No. 1011.

BRIEF FOR THE APPELLEE.

The opinion of the learned court below is relied upon as fully warranting its judgment upon the *findings.*

The case is peculiarly an important one, covering, as is said, about one hundred cases, which involve some $6,000,000.

In reply, however, to a citation by the appellant, we submit that the case of Memphis *vs.* Brown, 20 Wallace, 289, is not in point. There Brown received *a loan* of bonds from the city, which he had disposed of, and so was unable to return. When he came to settle the city sought to charge him with *the face* of the bonds, but it was held that he was only chargeable with their *value* at the time of settlement, *i. e.*, what it would *cost* to make

good his default. Under that case the present appellant must in any event account for the amount that it would cost to make good his default in not returning the District bonds. At the time he brought suit for them *first* he made complaint of the settlement; inasmuch as the District bonds were far above par, instead of anything being due to him, he was, upon such an account, largely in debt. But that case does not apply, for there was no *loan* to him.

S. F. PHILLIPS,
Solicitor General.

JNO. C. FAY.